LIBRARY
SUPREME COURT, U. S.

FILED
DEC 2 1967
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 872

CLAUDE R. KIRK, JR., as Governor the the State of Florida, et al.,

Appellants,

v.

EDMOND J. GONG, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

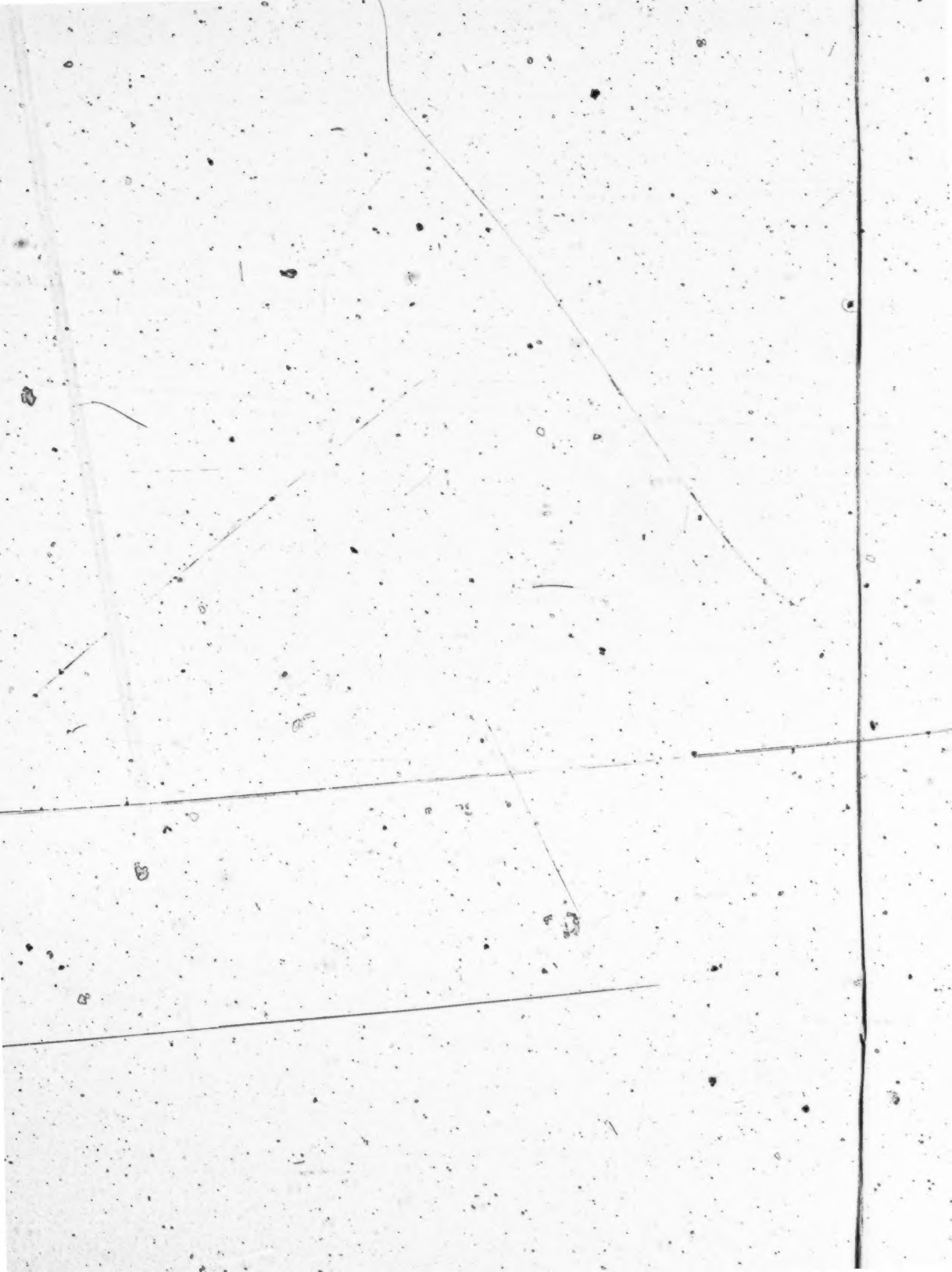
EARL FAIRCLOTH
Attorney General

T. T. TURNBULL
Assistant Attorney General

ROBERT A. CHASTAIN
Assistant Attorney General

The Capitol
Tallahassee, Florida 32304

Attorneys for Appellants



INDEX

	Page
JURISDICTIONAL STATEMENT	1
Opinions Below	3
Jurisdiction	3
Statutes Involved	4
Question Presented	5
STATEMENT OF THE CASE	5
THE QUESTIONS ARE SUBSTANTIAL	
The refusal of the lower court to reconsider its order of August 2, 1967, which utilized factored population figures in the Congressional redistricting of Florida in lieu of the last Federal decennial census was in error and repudiates the principle of Reynolds v. Sims, Klahr v. Goddard and Maryland Citizens Committee v. Tawes	9
CONCLUSION	15

INDEX TO APPENDICES

Page

Appendix A-1. Order and opinion dated August 2, 1967. ..... App. 1

Appendix A-2. Order dated September 27, 1967. ..... App. 12

Appendix A-3. Order of Court of Appeals, 5th District dated March 27, 1967. ..... App. 13

Appendix A-4. Order (unreported) dated March 1, 1966. ..... App. 16

Appendix B-1. Chapter 65-2441, Laws of Florida, Extra Session 1965 ..... App. 18

AUTHORITIES CITED

Cases:

Alton v. *Tawes*, 384 U. S. 315 (1966) 14

Calkins v. *Hare*, 228 F. Supp. 824 (1964) 12

Duddleston v. *Grills*, 385 U. S. 455 (1967) 2, 4

Gong v. *Kirk*, ... F. Supp. ....., (S.D. Fla. 1967) 3

Gong v. *Kirk*, ... F. Supp. ....., (S.D. Fla. 1967) 3

Gong v. *Kirk*, 375 F. 2d 728 (5th Cir. 1967) 3

Klahr v. *Goddard*, 250 F. Supp. 537 (1966) 10, 13

Maryland Citizens Committee for Fair Congressional Redistricting v. *Tawes*, 253 F. Supp. 731 (1966) 10, 14

Reynolds v. *Sims*, 377 U.S. 533 (1964) 2, 4, 10, 12

Swann v. *Adams*, 385 U. S. 440 (1967) 2, 4

Wesberry v. *Sanders*, 376 U. S. 1 (1964) 4, 6

Constitution:

Florida Constitution, Section 5, Article VII 11

IN THE
SUPREME COURT OF THE UNITED STATES

No._____

CLAUDE R. KIRK, JR., as Governor of the State of Florida, et al.,

Appellants,

v.

EDMOND J. GONG, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

This is an appeal by Claude R. Kirk, Jr., as Governor of the State of Florida, Tom Adams, as Secretary of State of the State of Florida, Earl Faircloth, as Attorney General of the State of Florida, and Fred O. Dickinson, Jr., as Comptroller of the State of Florida, as some of the defendants below, from an opinion and order of the United States District Court for the Southern District of Florida, entered on August 2, 1967, and a subsequent order dated September 27, 1967, finding a legislative enactment (Chapter 65-2441, Laws of Florida

1965) which divided the state of Florida into twelve Congressional districts as being unconstitutional in violation of Article I, section 2, of the Constitution of the United States, and the equal protection clause of the Fourteenth Amendment under the rule in *Duddleston v. Grills*, 385 *U.S.* 455(1967) vacating, *Grills v. Branigan*, 255 F. Supp. 155 (S.D. Ind. 1966); *Swann v. Adams*, 385 U.S. 440 (1967); *Reynolds v. Sims*, 377 U.S. 533 (1964). The opinion and order of August 2, 1967, also enjoined the defendants from enforcing Florida Statute section 8.01 (1965); and redistricted the twelve Congressional districts by judicial decree using a factored population which was established by a calculation of the population of each relevant voting precinct by determining the ratio, based on the most recent voter registration figures, of the registered voters in each voting precinct to the total registered voters of the particular county and applying that ratio to the county population as shown by the 1960 decennial census. The court-ordered redistricting plan using the factored population formula demonstrated a total maximum deviation of 1.94 per cent between the smallest and largest Congressional districts.

Subsequent to the entry of the lower court's opinion and order dated August 2, 1967, these appellants were given a report from the United States Department of Commerce, Bureau of the Census, dated September 6, 1967, which demonstrated that by applying the 1960 decennial census population through census enumeration districts to the court-ordered Congressional districts there is a total maximum deviation of 11.83 per cent between the smallest and largest Congressional districts. This fact was brought to the lower court's attention by these appellants in the Suggestion for Reconsideration of Judgment and Final Order and Motion to Stay Proceedings on September 20, 1967, but the lower court refused to consider this

matter and by its order dated September 27, 1967, reaffirmed its order of August 2, 1967.

This statement is submitted to show that the Supreme Court has jurisdiction of this appeal and that the District Court erred in using factored population figures in lieu of the last Federal decennial census in redistricting the Congressional districts of Florida and that important and substantial questions requiring immediate action by this Court are presented.

OPINIONS BELOW

The orders appealed from are reported at *Gong v. Kirk*, ... F. Supp. ..... (S.D. Fla. 1967), and *Gong v. Kirk*, ... F. Supp. ..... (S.D. Fla. 1967). Earlier opinions in this case are reported as *Gong v. Kirk*, 375 F. 2d 728 (5th Cir. 1967), and an unreported order of the lower court dated March 1, 1966. Copies of the orders of the court below are printed herein as Appendices A-1 and A-2. A copy of the order of the U. S. Court of Appeals for the Fifth Circuit is printed herein as Appendix A-3. A copy of the unreported order of the lower court dated March 1, 1966 is printed herein as Appendix A-4.

JURISDICTION

This suit was filed by the appellees, plaintiffs below, in March, 1964, pursuant to Title 42, U.S.C., sections 1983 and 1988, Title 28, U.S.C., sections 1443 (3), 2201 and 2281. The lower court by its order dated March 11, 1964, denied plaintiffs' Motion for Preliminary Injunction without prejudice and deferred decision on the plaintiffs' Motion for Judgment on

the Pleadings until after the 1965 session of the Florida legislature. In August, 1965, the plaintiffs below again petitioned the lower court to review a new Congressional redistricting plan (Chapter 65-2441, Laws of Florida, Extra Session 1965). The lower court by its order dated March 1, 1966, decreed Chapter 65-2441 to be constitutionally valid on a temporary basis. An appeal was taken to the U. S. Court of Appeals for the Fifth Circuit and that court by its order dated March 17, 1967, held that the lower court erred in not convening a three-judge court and it therefore lacked jurisdiction over this matter. The plaintiffs below again petitioned the lower court to convene a three-judge court to consider the issues. A three-judge court was duly convened and this is an appeal from the orders of that District Court dated August 2, 1967 and September 27, 1967. Notice of appeal was filed by the appellants herein on October 2, 1967. The jurisdiction of the Supreme Court to review the orders of the District Court is conferred by Title 28, U.S.C., section 1253. The following decisions sustained the jurisdiction of the Supreme Court to review on direct appeal the judgments in this case: *Duddleston v. Grills*, 385 U.S. 455 (1967); *Swann v. Adams*, 385 U.S. 440 (1967); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

STATUTES INVOLVED

Directly involved are the provisions of Chapter 65-2441, Laws of Florida, Extra Session 1965 (SB 26-XX), which is printed herein as Appendix B-1. Although the appellants do not seek to urge the constitutionality of Chapter 65-2441, supra, it was the vehicle by which the plaintiffs below instituted these proceedings which resulted in the court-ordered Congressional redistricting now on appeal.

QUESTIONS PRESENTED

Does the use by the United States District Court of factored population figures in the Congressional redistricting of the state of Florida in lieu of the last Federal decennial census meet the minimal requirements of the equal protection clause of the United States Constitution where the factored population figures utilized by the court below show a maximum deviation of 1.94 per cent but the latest Federal decennial census shows a total maximum deviation of 11.83 per cent?

STATEMENT OF THE CASE

This proceeding was originally filed by the appellees in March, 1964, attacking the provisions of Chapter 61-302, Laws of Florida 1961, which amended section 8.01, Florida Statutes, to provide for twelve Congressional districts in the state of Florida. The petition at that time demonstrated that in one instance a Congressional district exceeded the average population of 412,630 by 60.03 per cent and another Congressional district was below the average of 412,630 by 42.50 per cent. The plaintiffs below also filed a Motion for Preliminary Injunction and a Motion for Judgment on the Pleadings. Subsequent to this the defendants all filed their answers to the petition substantially admitting all of the factual matters contained therein. The lower court, in the form of one United States District Judge, by its order dated May 11, 1964, denied the plaintiffs' Motion for Preliminary Injunction without prejudice and deferred decision on the plaintiffs' Motion for Judgment on the Pleadings until sixty days after the 1965 session of the Florida legislature.

Subsequent to the foregoing proceedings, the Florida legislature in special session enacted Chapter 65-2441, Laws of Florida, Extra Session 1965 (SB 26-XX) and the plaintiffs again petitioned the lower court to review the foregoing Congressional redistricting plan in the light of constitutional requirements. This new petition demonstrated that Chapter 65-2441, Laws of Florida, provided for a total maximum deviation of 21.94 per cent between the highest and the lowest Congressional districts. The lower court, again in the form of one United States District Judge, by its order dated March 1, 1966, decreed that Chapter 65-2441, Laws of Florida, Extra Session 1965, met the constitutional standard of *Wesberry v. Sanders*, supra, on a temporary basis and retained jurisdiction of the case until sixty days after the 1967 session of the legislature.

An appeal was taken from the order of March 1, 1966, to the U. S. Court of Appeals for the Fifth Circuit by the plaintiffs below and the U. S. Court of Appeals by its order dated March 27, 1967, held that the lower court erred in not convening a three-judge court and it (the lower court) was therefore without jurisdiction to entertain the petition of the plaintiffs below.

Pursuant to the mandate of the U. S. Court of Appeals, the plaintiffs below again petitioned the U. S. District Court for the Southern District of Florida to convene a three-judge court, declare that section 8.01, Florida Statutes 1965, violates the United States constitution, enjoin the defendants from holding any further elections under such statute on the ground that it is unconstitutional and grant other coercive relief as the court may deem appropriate. Pursuant to this petition, a three-judge court was convened and the court by its Order for Pre-trial Conference dated May 29, 1967, requested a state-

ment from all the parties in response to certain questions which included, inter alia, what the parties proposed as a fair and constitutional redistricting and what census or censuses or other calculations of Florida population could or would be a reliable basis for the court to consider in respect to redistricting.

In response to the District Court's queries, the plaintiffs and the defendants below filed what they considered to be, at that time, calculations of Florida population which the plaintiffs and the defendants thought would be a reliable basis for the court to consider in respect to redistricting. The plaintiffs and defendants below used a factored population which provided that in any county where a county line is crossed and it becomes necessary to consider the population in precincts, a factor had been applied to the registered voters in each precinct which is demonstrated by the following:

$$\text{(1960)}\quad \frac{\text{Total County Registration}}{\text{County Population}} = \frac{\text{Precinct Registration}}{\text{Precinct Population}}$$

Thus, by the utilization of the above formula, multipliers were used in the following applicable counties by these appellants: Duval, Dade, Broward, Polk, Brevard. Since the appellees used a slightly different scheme in their approach to Congressional redistricting and crossed county lines in other areas, they used multipliers for certain other counties in their approach to a Congressional redistricting plan. Both the appellants and appellees, however, used the same basic formula in their approach to factoring the counties in which a county line was crossed.

In further response to the court's questions in the pre-trial order dated May 29, 1967, both the appellants and the ap-

pellees concurred in stating that the census or censuses of Florida population that would be a reliable basis for the court to consider in respect to redistricting would be the use of only the 1960 Federal census.

Subsequent to this, the lower court by its order dated August 2, 1967, adopted, with slight modification, HB 3088, which was being considered by the 1967 session of the Florida legislature but which was not ultimately passed by the legislature before its adjournment. The court-ordered redistricting plan, based largely on HB 3088, and using the factored population formula, redistricted the Congressional districts of Florida into twelve districts with a total maximum deviation of 1.94 per cent between the smallest and the largest Congressional districts.

Subsequent to the entry of the court's opinion and order of August 2, 1967, the appellants herein were made aware of the fact that when the census enumeration districts from the 1960 census were applied to the areas where county lines are crossed and where the factored population formula was applied to the precincts within such counties, there resulted a total maximum deviation of 11.83 per cent between the smallest and largest Congressional districts. A comparison of the differences is as follows:

District	Court	Court deviation from equality	Census	Census deviation from equality
1	415,496	+ .69	415,496	+ .69
2	407,677	— 1.20	407,677	— 1.20
3	411,683	— .23	418,595	+ 1.44
4	409,716	— .71	406,367	— 1.52
5	409,532	— .75	405,969	— 1.62
6	415,704	+ .74	416,579	+ .95
7	414,474	+ .44	413,597	+ .23

8	411,450	— .29	411,450	— .29
9	409,952	— .64	401,251	— 2.76
10	414,998	+ .57	405,633	— 1.70
11	414,759	+ .51	448,885	+ 8.78
12	414,691	+ .49	400,061	— 3.05
Smallest	—1.20% (2nd Dist.)		Smallest	—3.05% (12th Dist.)
Largest	.74% (6th Dist.)		Largest	8.78% (11th Dist.)
Total maximum deviation 1.94%			Total maximum deviation 11.83%	

This matter was brought to the lower court's attention pursuant to the provisions of Federal Rules of Civil Procedure, Rule 60 (b), 28 U.S.C., by the appellants' Suggestion for Reconsideration of Judgment and Final Order and Motion to Stay Proceedings.

On September 27, 1967, the lower court reaffirmed the judgment and final order of August 2, 1967, and denied the appellants' Motion to Stay Proceedings.

It is from the judgment and final order of August 2, 1967, and subsequent order of September 27, 1967, that the appellants herein have entered this appeal.

THE QUESTIONS ARE SUBSTANTIAL

The refusal of the lower court to reconsider its order of August 2, 1967, which utilized factored population figures in the Congressional redistricting of Florida in lieu of the last Federal decennial census was in error and repudiates the principle of Reynolds v. Sims, Klahr v. Goddard and Maryland Citizens Committee v. Tawes.

To preface the argument on this statement, your appellants readily admit that they urged the use of factored population on

the court below without realizing the ultimate mathematical impact on the 1960 decennial population census in any Congressional district where a county line is crossed. The urging of the use of a factored population ratio on the court by the appellants was an honest effort, however, to assist the court in arriving at a fair Congressional redistricting plan. Your appellants also submit that this undoubtedly was the motive of the appellees in urging the factored population formula to the lower court.

The thrust of the appellants' argument is, however, that after having discovered the ultimate mathematical result of using factored population figures in the Congressional redistricting scheme, the lower court refused to consider the appellants' Suggestion for Reconsideration of Judgment and Final Order and Motion to Stay Proceedings filed on September 20, 1967. The foregoing motion, together with the exhibits, clearly demonstrated that when the census enumeration districts from the 1960 census were applied to the areas where county lines were crossed and where the factored population formula was applied to precincts within such counties, there resulted a total maximum deviation of 11.83 per cent between the smallest and largest Congressional districts.

Appellants urge that the refusal by the lower court to consider their motion for Reconsideration of Judgment and Final Order and Motion to Stay Proceedings resulted in an error of the lower court and repudiated the principles of *Reynolds v. Sims*, 377 U.S. 533 (1964), *Klahr v. Goddard*, 250 F. Supp. 537 (1966) and *Maryland Citizens Committee for Fair Congressional Redistricting v. Tawes*, 253 F. Supp. 731 (1966).

In delineating what population figures should be utilized in *Reynolds v. Sims*, supra, the court stated, at page 583:

". . . Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect."

With regard to the use of population figures as prescribed y the constitution of the state of Florida, Section 5, Article II, of the constitution of the state of Florida provides as fol-ows:

"The Legislature shall no longer be required to provide for an enumeration of the inhabitants of the State. The last preceding decennial Federal census beginning with the Federal census of 1950 shall also be the State census and shall control in all population Acts and constitutional apportionments, unless otherwise ordered by the Legislature."

Considering the provision of the above cited section of the Florida constitution, the court in *Reynolds v. Sims*, supra, also stated, at page 584:

> "We agree with the view of the District Court that state constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible. But it is also quite clear that a state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements. When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."

With regard to the question as to whether raw population statistics or voting population statistics are governing in Congressional redistricting cases, the court in *Calkins v. Hare*, 228 F. Supp. 824, at page 826, made the following observation:

> ". . . We take Wesberry as our precedent. It is apparent from the majority opinion that this issue had consideration in the Supreme Court in Wesberry, since Justice Harlan's dissenting opinion (n. 4) raises this precise question—'Is the number of voters or the number of inhabitants controlling?' The answer, in our judgment, is found again and again in the Wesberry opinion, from the opening paragraph, referring to the 1960 census by districts and averages and referring to 'this inequality of population', to

the closing paragraph which speaks of 'equal representation for equal numbers of people.' We find no inconsistency in the opinion."

Other courts, who were apparently more farsighted than the appellants concerning the question as to what census or censuses should be used, foresaw the dangers of using factored population in an effort to arrive at a proper population consideration in Congressional redistricting. In *Klahr v. Goddard*, 250 F. Supp. 537 (1966), the court, speaking on what population figures should be used in reapportionment matters, stated the following, at page 540:

"The court finds that in making the several reapportionments herein provided for, it can do so most accurately by basing its findings upon the figures appearing in the 1960 census. For the purpose of supporting his contention that the reapportionment should be based upon 1964 populations, plaintiff has through his witnesses undertaken to project an estimated 1964 population by calculating the ratio of registered voters to population in various counties in census years and *then applying that ratio to the* registration of voters for the 1964 elections. The court finds that the calculations thus produced by the plaintiff have not been established with sufficient certainty and accuracy to warrant their use by the court to determine an appropriate reapportionment of congressional districts and state legislative districts in this decree. Recent census figures secured by actual count in the City of Phoenix, in Pinal County and in Yuma County, depart so far from plaintiff's estimates and calculations of 1964 population in those areas that the court feels justified in rejecting the calculated 1964 population figures as a basis for reapportionment in this case."

The foregoing principle was again followed in *Maryland Citizens Committee for Fair Congressional Redistricting v. Tawes*, supra, at page 734, as follows:

> A difficulty encountered by anyone who undertakes in 1966 to draw district lines with a view to achieving substantial population equality, is that the only accurate figures available are those from the 1960 census. The dilemma presents two possible choices: to accept the 1960 census figures which are not up to date, or to attempt to make estimates of changes in population figures since that date. Neither choice is a happy one, but we have concluded that it is better to adhere to the census figures than to engage in speculative estimates or projections which vary widely with the estimators and the manner in which they handle the figures available to them from various sources. The alternative we have rejected would indeed lead into a mathematical thicket. See Klahr v. Goddard, 250 F. Supp. 537 (D. Ariz. 1966)."

The foregoing opinion was affirmed, *sub nom Alton v. Tawes*, 384 U.S. 315 (1966).

Your appellants urge that in their effort to use a factored population they actually altered the 1960 Federal decennial census figures by attempting to distribute the county population of 1960 on an equitable basis throughout the voting precincts in the Congressional districts and thereby came into conflict with the census enumeration districts of 1960, which resulted in the disparity between the actual census figures demonstrated in appellants' Suggestion for Reconsideration of Judgment and Final Order and Motion to Stay Proceedings filed in the lower court and the lower court's order of August 2, 1967.

Appellants submit, however, that the lower court erred in not reconsidering its order of August 2, 1967, when it is clearly demonstrated that the lower Court's Congressional redistricting plan, utilizing factored population as a basis for the redistricting in the areas where county lines are crossed, does not conform with the census enumeration districts of the 1960 decennial census, and said plan actually has a total maximum deviation of 11.93 per cent.

CONCLUSION

For the reasons stated, this court has jurisdiction of this action and should reverse the orders below and order the District Court to cause redistricting of the Congressional districts of the state of Florida in a manner consistent with the constitution of the United States.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

T. T. TURNBULL
Assistant Attorney General

ROBERT A. CHASTAIN
Assistant Attorney General

The Capitol
Tallahassee, Florida 32304

Attorneys for Appellants